APPEAL NO. 031147
FILED JUNE 25, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 5, 2003. The hearing officer resolved the disputed issues by deciding: (1) that the appellant/cross-respondent (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; (2) that since the carrier waived the right to contest compensability of the claimed injury, as a matter of law, the respondent/cross-appellant (claimant) sustained a compensable injury on _____; (3) that since the carrier waived the right to contest compensability of the claimed injury, as a matter of law, the carrier is not relieved from liability under Section 409.002, because of the claimant's failure to timely notify his employer pursuant to Section 409.001; and (4) that the claimant had disability resulting from a compensable injury sustained on _____, from September 6 through November 25, 2002.

The carrier appealed, arguing that the hearing officer's waiver, compensability, and disability determinations are against the great weight and preponderance of the evidence. The claimant cross-appealed, arguing that the hearing officer erred in finding that the claimant did not sustain physical harm and damage to his low back while performing duties within the course and scope of his employment on _____, and that the claimant did not report a _____, work-related injury to any supervisory or managerial personnel with the employer within thirty days of the date of the claimed injury. Both parties responded to the other party's appeal.

DECISION

Affirmed.

The carrier contends that the hearing officer erred in determining that it waived the right to contest the compensability of the claimed injury, and as a matter of law, the claimant sustained a compensable injury on _____, and the carrier is not relieved from liability under Section 409.002, because of the claimant's failure to timely notify his employer pursuant to Section 409.001. The carrier argues that Section 409.021 "reveals that the only defense that a carrier waives or may waive under that section is a compensability defense" and that the carrier is "relieved of liability on the basis of a claimant's failure to either give timely notice of the injury to his employer or have good cause for failing to give timely notice to his employer." The carrier cites Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.) (holding that a carrier cannot waive into coverage, for a person not employed by its insured on the date of injury, by failing to observe the timely defense provisions of Section 409.021), to support its argument that coverage defenses are the same as liability defenses. In the instant case, it is undisputed that the claimant was an employee; however, the Appeals Panel has held that a carrier has lost

its right to contest compensability, including the right to assert a defense under Section 409.002 that the claimant failed to notify the employer of an injury within 30 days of the injury, due to the carrier's failure to contest the claim in accordance with Section 409.021. Texas Workers' Compensation Commission Appeal No. 022027-S, decided September 30, 2002. We further observe that in the 1989 Act, Section 406.031, Liability for Compensation, is located in the "coverage requirements" subchapter. This section provides that the carrier is liable for compensation for an "employee" that is subject to the subtitle and for an injury that arises out of the course and scope of employment. The factors emphasized by the carrier in challenging the hearing officer's waiver determinations on appeal are the same factors it emphasized at the hearing. The significance, if any, of those factors was a matter for the hearing officer. Nothing in our review of the record reveals that the challenged determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse those determinations on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The carrier contends that it did not receive written notice of injury until October 25, 2002. The hearing officer determined that the carrier received the written notice of the claimed injury on October 6, 2002. The hearing officer explained in the Statement of the Evidence paragraph that the evidence established that the Texas Workers' Compensation Commission (Commission) sent a Notice of New TWCC Number (CS-45) dated October 1, 2002, to Miller & Henderson law firm (claimant's attorney) and copies to the claimant and "St. Paul Fire and Marine Insurance Company." The hearing officer relying on Rule 102.5(d), determined from the evidence that the carrier was deemed to have received the CS-45 on October 6, 2002. It is undisputed that the carrier contested compensability on October 28, 2002, by filing a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Commission. The carrier argues on appeal that the evidence does not establish that the CS-45 was mailed to the carrier and that the Commission listed an incorrect mailing address for the carrier. The carrier essentially reiterated the same arguments that were made before the fact finder. From the evidence, the hearing officer could determine that the carrier received written notice of injury on October 6, 2002, and that the carrier disputed the claimed injury on October 28, 2002; therefore, the carrier waived its right to contest compensability of the claimed injury pursuant to Section 409.021 by failing to file its contest within seven days of the date it received its first written notice of the claimed injury. We conclude that the hearing officer's determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

The claimant contends that the hearing officer erred in determining that the claimant did not sustain an injury in the course and scope of employment on _____, and that he did not timely report his work-related injury to his employer within thirty days of the date of the claimed injury. The carrier disputed the hearing officer's disability determination. The hearing officer heard claimant's testimony and reviewed the evidence in this case. We have reviewed the complained-of determinations and conclude that the injury, timely notice, and disability issues involved

fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The carrier next asserts that the hearing officer's waiver determination is against the great weight and preponderance of the evidence because the claimant did not sustain an injury. The carrier cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has recognized that Williamson is limited to situations where there is a determination that the claimant had no injury, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. The hearing officer found, in this case, that the claimant sustained "physical harm and damage to his low back." As indicated above, such findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Panel
Manager/Judge

_____
Margaret L. Turner
Appeals Judge